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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TALMADGE BATES, Defendant and Appellant.	A152906 (Solano County Super. Ct. No. VCR228462)

Talmadge Bates was convicted of battery on a spouse and criminal threats with a prior serious or violent felony conviction. He asserts the prosecutor committed prejudicial misconduct in rebuttal argument by undermining the presumption of innocence and commenting on his failure to testify. He also asserts his lawyer's failure to object was ineffective assistance of counsel. Bates's claims of error were forfeited and he has not shown his counsel's performance was ineffective. We affirm.

BACKGROUND

Bates and the victim had been married for 15 years at the time of the offenses. The victim described a years-long history of verbal and physical abuse that started when she was pregnant with their first child. She testified that she never reported the abuse until the most recent incident, because "I think that somehow I thought that it ain't that bad. Even though it was getting bad. Like you talk yourself into not calling the police. You talk yourself into 'Well, maybe if I give him a chance. Maybe if I, you know, do something, that I don't say these words or act a certain way he won't—I won't make him mad to be enraged enough to hit me.' " In addition, the victim was reluctant to deprive

her daughters of their relationship with their father. "[T]hey do have a good relationship other than him, you know, going off on me."

On the morning of December 18, 2016, Bates and the victim woke up in "a bad space." The victim was disappointed in herself for using drugs with Bates the night before and told him she was no longer going to give him money for drugs. Angered, Bates yelled and then swung at her. The victim ducked the blow, but Bates's fingernail scratched her forehead, causing some bleeding. The victim was concerned Bates was "enraged enough to really, like, knock me out or [¶] . . . [¶] do some bodily harm."

The victim went into the bathroom and started to cry. Bates yelled and screamed at her from the living room. Eventually the victim joined him there, said their marriage was over and told him to leave. Bates became angrier and was "looking at me crazy, going off." As the victim sat on the couch crying, Bates got a paring knife from the kitchen. He rushed at her, grabbed her collar and pushed her into the couch. Holding the point of the knife to the victim's face, he said " 'Don't you know I will gut you?' " Their fights had never before escalated to this point. The victim feared for her life, so she nervously laughed to defuse the situation. She told Bates, "Man, you know you ain't about to do that. Put that knife down." Bates looked stunned, "kind of snapped out of it," and returned the knife to the kitchen.

After that, hours went by and the two did not speak to each other. Eventually Bates said, " 'Well, I'm gonna end up having to get away from you because you're going to make me do something to you.'" The victim did not call the police because they did not do anything to protect her when she called them once before. She also wanted Bates to repay money he owed her from a check he was expecting that week. But after he got his check "he took off with the money."

On December 23, 2016, the victim was in San Francisco when an acquaintance told her Bates was around the corner from the Tenderloin police station, using drugs and saying bad things about her. Fearing he might hurt her, the victim went to the police station and reported the December 18 assault to Officer Alexander Anton-Buzzard. The officer described her as "frightened and panicked. She was actively crying. Her eyes

were bloodshot, and she appeared terrified." Bates was soon located and arrested. When the victim learned he had been detained "[s]he was very relieved. She put her hands in her face. She was crying. She was thanking [the officer] personally."

But she did not end her relationship with Bates. She knew that when he got out of jail "he was going to come to my house, stalk me, act a fool. And I didn't want him to be homeless" and "cause problems at the house." When Bates was released she took him to a hotel where she was staying and shared cocaine with him. Over the following two months she continued to supply and occasionally use drugs with Bates to keep him from getting angry.

Bates was charged with assault with a deadly weapon (count 1), injury to a spouse (count 2) and criminal threats (count 3), with enhancements for personal use of a deadly weapon and a prior strike. The jury was unable to reach a verdict on assault with a deadly weapon and the weapon use enhancement. Both were dismissed on the state's motion. The jury acquitted Bates on count 2, injury to a spouse, but convicted him of the lesser included offense of battery on a spouse. The jury also convicted Bates on count 3, criminal threats, and the trial court found the prior strike allegation true. Bates filed a timely appeal from the judgment.

DISCUSSION

I. The Prosecutor's Remarks on the Presumption of Innocence

Bates contends reversal is required because the prosecutor argued in rebuttal that the presumption of innocence "was over" and Bates was no longer entitled to the benefit of the doubt. We disagree.

During voir dire, the trial court instructed the potential jurors on the presumption of innocence as follows:

"Does everybody understand that we are all presumed innocent? And the State, if they want to convict us, have to prove it up. You don't ever have to prove anything. As a defendant you don't have to prove anything. It is the State's job to prove whether you are guilty or not. Is everybody okay with that idea?

"So, again, Mr. Bates enjoys the presumption of innocence. You are all ok with that general idea? So we're not voting now. But right now he is cloaked in the presumption of innocence. He is not guilty. And it is on [the prosecutor] to bring it, as they say, and provide you with some evidence as to whether it is proven beyond a reasonable doubt.

[¶] . . . [¶]

"The defense doesn't have to prove anything. They don't have to put on any evidence. They can just simply argue to you and say, 'They didn't prove it to you. Don't believe [the victim.]' Right? 'Don't believe the People's evidence.' That's what they can do. It is up to the People.

So you may—that innocence train may have left the station. But there's only two choices when you are done. It is either guilty or not guilty. Not maybe. That's not one of the choices you get. So unless the People prove it beyond a reasonable doubt, he is entitled to a not guilty verdict." (Italics added.)

Bates called no witnesses at trial and focused his defense on discrediting the victim's testimony. Defense counsel argued: "So, again, the benefit of the doubt goes to [Bates]. They did not meet their burden. [The victim] is biased. She's got credibility problems. That's not enough to make it beyond this burden.

"This is a high standard. . . . This is beyond a reasonable doubt. And because of those problems with this case, I am asking you to come back with a not guilty verdict on all counts.

"They did not meet their burden. They did not prove essential elements. The benefit of the doubt goes to Mr. Bates."

In rebuttal, the prosecutor referenced the trial court's earlier train analogy. She argued:

"I just want to start off by saying the benefit of a doubt is not a legal standard. It's not a standard at all. What we talked about is the presumption of innocence that starts at the beginning of this trial. And as the Judge told you, it can leave that station at any point in time.

"When you saw [the victim] and saw how small she was, the train could have started leaving. When you heard [the victim] start to testify, the train could have started leaving. When you heard [the victim] testify to the additional abuse that she had sustained over the last 15 years, the train could have left the station.

"So, no, there's no benefit of the doubt at this point. You have heard all of the evidence. And the standard now is beyond a reasonable doubt. And I submit to you all that I have proven that."

Defense counsel did not object to the prosecutor's argument.

Analysis

Bates contends the prosecutor's rebuttal comments about the presumption of innocence "train" having left the station and "no benefit of the doubt at this point" were prejudicial misconduct. "But a claim of prosecutorial misconduct is reviewable only if the defendant makes a timely objection at trial and requests the trial court to admonish the jury to disregard the impropriety" or an admonition would not have cured the harm. (*People v. Cowan* (2017) 8 Cal.App.5th 1152, 1161.) Bates neither objected nor requested an admonition and, even were we to assume the comment was improper, there is no reason to suppose an admonition by the trial court would not have cured it. (*Ibid.*; *see People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) Furthermore, the record discloses no grounds for applying any exception to the general rule requiring both an objection and a request for a curative instruction. (See, e.g., *People v. Frye* (1998) 18 Cal.4th 894, 970 (*Frye*), disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Accordingly, this alleged claim of misconduct is forfeited and may not be raised in this appeal.

Anticipating forfeiture, Bates argues his lawyer's failure to object to the challenged argument was ineffective assistance of counsel. Not so. To establish constitutionally defective assistance of counsel a defendant must show trial counsel's performance fell below an objective standard of reasonableness and that the deficient performance was prejudicial. "Prejudice generally requires an affirmative showing that, absent counsel's errors, there is a reasonable probability of a more favorable outcome.

[Citation.] A 'reasonable probability' is not a showing that 'counsel's conduct more likely than not altered the outcome in the case,' but simply 'a probability sufficient to undermine confidence in the outcome.' " (*In re Cordero* (1988) 46 Cal.3d 161, 180; *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.)

We are not persuaded the prosecutor's remarks about the presumption of innocence were misconduct (see *People v. Booker* (2011) 51 Cal.4th 141, 183-185 (*Booker*) [argument that the presumption of innocence was overcome by the evidence was not improper]; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 189-190.) But even if they were, the remarks were harmless. We review a prosecutorial misconduct claim to determine whether the jury would have understood or applied the challenged comments in an improper or erroneous manner. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1403; *Frye, supra,* 18 Cal.4th at p. 970.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*Frye, supra,* 18 Cal.4th at p. 970; *People v. Howard* (1992) 1 Cal.4th 1132, 1192.) Here, the clear thrust of the challenged comments, taken as a whole, was that the jury should find the presumption of evidence had been overcome *based on the state of the evidence*. The jurors were properly instructed on the burden of proof and presumption of innocence. They were also instructed to follow the law as explained by the court, not the lawyers. There is no reason to believe they did not understand and follow those instructions. (See *Frye, supra,* 18 Cal.4th at p. 970; see also *People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Bates puts great weight on what he calls "obvious problems" with the victim's credibility to argue the allegedly improper argument affected the verdict. In his view, the victim's testimony was "unbelievable" and "implausible" because she waited several days to report the attack and continued to see and supply him with drugs over the following weeks. He argues, in essence, that victims of spousal abuse are inherently untrustworthy unless they immediately report the abuse and terminate their relationship with the abusing partner. His argument is premised on a long-since debunked assumption about domestic violence victims.

" 'A fundamental difference between family violence and other forms of violence (such as street violence) is that family violence occurs within ongoing relationships that are expected to be protective, supportive, and nurturing. The ties between victim and victimizer often are the strongest emotional bonds, and victims frequently feel a sense of loyalty to their abusers. . . . [¶] Consequently, even a victim who reports an abusive family member to police may later protect the person by denying, minimizing, or recanting the report.' [Citations.] Thus, the prosecution of domestic violence cases presents particular difficulties. 'Unlike conventional cases . . . where prosecutors rely on the cooperation and participation of complaining witnesses to obtain convictions, in domestic violence cases prosecutors are often faced with exceptional challenges. Such challenges include victims who refuse to testify, who recant previous statements, *or whose credibility is attacked by defense questions on why they remained in a battering relationship*.' " (*People v. Brown* (2004) 33 Cal.4th 892, 899, italics added; see *People v. Aris* (1989) 215 Cal.App.3d 1178, 1195 ["[b]attered women tend to stay in the abusive relationship for a number of reasons"]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087-1088.)

Bates also argues the purported misconduct was likely to have affected the verdict because this case was so close. This is so, he maintains, because the jury rejected the victim's claim that he inflicted a wound or other bodily injury and deadlocked on the knife-related charges. But the jury assesses witness credibility, not this court. The jurors' apparent rejection of part of the victim's version of events does not permit us to infer they would have disbelieved her testimony in its entirety but for the allegedly improper rebuttal. In fact, the jury's apparently discriminating and careful assessment of the victim's testimony debunks this argument. In sum, the record presents no reasonable likelihood that Bates was prejudiced by his lawyer's failure to object.

II. The Prosecutor's Comment On the State of the Evidence

Bates asserts the prosecutor improperly commented on his failure to testify in violation of *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), when she argued in rebuttal that "no one has stood before you and said this did not happen. No one. Ladies

and gentlemen of the jury, the reason why is because it did happen." This assertion was also was forfeited for appeal by Bates's failure to object and request an admonition. (*People v. Medina* (1995) 11 Cal.4th 694, 756-757; *People v. Fierro* (1991) 1 Cal.4th 173, 211.) Bates again asserts that failure was ineffective assistance of counsel, but here, too, we disagree.

While the prosecution may not directly or indirectly refer to the defendant's decision not to testify on his own behalf (*Griffin, supra,* 380 U.S. at p. 613), the same prohibition does not extend to comments on a defendant's failure to introduce material evidence or call logical witnesses. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339–1340; *People v. Vargas* (1973) 9 Cal.3d 470, 475.) "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford, supra*, at p. 1340.) Thus, in *People. v. Ratliff* (1986) 41 Cal.3d 675, 691, it was not misconduct when the prosecutor stated: " 'Now is there any evidence on the other side? Any evidence at all? None has been presented to you. Absolutely zero has been presented to you by [the defendant] and his attorney.' " Similar allegations of prosecutorial misconduct have been rejected as to arguments that " 'Ladies and gentlemen, you have now heard the entirety of the case . . . . Obviously, if there has been some or is some defense to this case, you'd either have heard it by now or for some reason nobody's talking about it' " (*People v. Johnson* (1989) 47 Cal.3d 1194, 1236, overruled on another point in *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1173-1174) and " '[p]ut yourself in the position of being a defendant and you can bet your boots that if you had anything to offer by way of evidence, by way of alibi, that you would offer it' " (*People v. Morris* (1988) 46 Cal.3d 1, 35-36, disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5; see also *People v. Gonzales* (2012) 54 Cal.4th 1234, 1275 ["As for the prosecutor's reference to witnesses not called, it is neither unusual nor improper to comment on the failure to call logical witnesses].)

The prosecutor's comments here did not transgress recognized boundaries. She did not comment on Bates's decision not to testify. Her argument, rather, was that he failed to offer any witnesses to contradict the victim. Such witnesses would logically include neighbors, friends, family or coworkers who could refute the victim's testimony about the couple's history of domestic violence or her claim that Bates's blow caused a cut on her forehead. Indeed, defense counsel signaled the potential importance of such witnesses when she argued the prosecutor failed to call family, friends, coworkers or police officers to *corroborate* the victim's testimony. Defense counsel cannot be considered ineffective for failing to make groundless objections, so there was no ineffective assistance. (*People v. Boyette* (2002) 29 Cal.4th 381, 437, 455; *People v. Thompson* (2010) 49 Cal.4th 79, 122.) Moreover, even if the remark crossed the line of permissible argument,[1] defense counsel could have reasonably made a tactical decision not to call undue attention to it with an objection. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 581-582.)

DISPOSITION

The judgment is affirmed.

[1] To be clear, it did not.

_____
Siggins, P.J.

WE CONCUR:

_____
Fujisaki, J.

_____
Wiseman, J.*

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.